United States
CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

MEMORANDUM

DATE: July 10, 2001

TO : CLD

Through: Todd A. Stevenson, Acting Secretary, OS

FROM : Martha A. Kosh, OS

SUBJECT: Proposed Revision to Interpretative Rule on Substantial Product Hazard Reports, 16 C.F.R. Part 1115 (66 Fed. Reg. 30655 (June 7, 2001)

ATTACHED ARE COMMENTS ON THE CA 01-4

COMMENT	DATE	SIGNED BY	AFFILIATION
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July 9, 2001

VIA FACSIMILE AND U.S. MAIL

Mr. Todd A. Stevenson
Acting Secretary
Office of the Secretary
U.S. Consumer Product Safety Commission
Washington, DC 20207

Re: Proposed Revision to Interpretative Rule on Substantial Product Hazard Reports, 16 C.F.R. Part 1115 (66 Fed. Reg. 30655 (June 7, 2001))

Dear Mr. Stevenson:

I appreciate the opportunity to comment on CPSC's recent proposal to revise its interpretative rule regarding substantial product hazard reports, 16 C.F.R. §1115.12(f), to include reference to information concerning product experience outside the United States. 66 Fed. Reg. 30655 (June 7, 2001). Among the clients I represent are companies that distribute consumer products in the United States and are U.S. subsidiaries of multi-national corporations that have separate subsidiaries which distribute similar products in other countries. I am concerned that the Commission's proposed revision in the reporting rule is premised on unfounded assumptions and unrealistic expectations regarding such companies. In addition, despite its expressed intention, the proposal does not accurately reflect the substance of CPSC's recently adopted policy statement regarding the treatment of foreign information under Section 15 of the CPSA. The proposed revision instead sweeps more broadly and raises the potential for later interpretations that unfairly seek to impose wide-ranging compliance obligations on such companies. The proposed revision to the rule must be reconsidered and modified to rectify these problems.

I. The Proposed Revision Does Not Reflect the Substance of the Policy Statement

On June 7, 2001, CPSC published its final policy statement entitled "Guidance Document on Reporting Information Under 15 U.S.C. 2064(b) About Potentially Hazardous Products Manufactured or Distributed Outside the United States," 66 Fed. Reg. 30715. By its terms, the policy statement explicitly contemplates the situation where a firm "obtains information" that meets the criteria for reporting under Section 15(b) which includes incidents or experience concerning a product sold in a foreign country:

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> "The Commission interprets the statutory reporting requirements to mean that, if a firm obtains information that meets the criteria for reporting listed above and that is relevant to a product it sells or distributes in the U.S., it must report that information to the CPSC, no matter where the information came from. Such information could include incidents or experience with the same or a substantially similar product, or a component thereof, sold in a foreign country." Id. at 30717 (emphasis added).

In contrast, CPSC's contemporaneously proposed revision to the reporting rule would add a sentence specifying that information which a firm should study and evaluate in order to determine whether it is obligated to report under Section 15(b) "may include information about product experience, performance, design, or manufacture outside the United States that is relevant to products sold or distributed in the United States." 66 Fed. Reg. at 30656. This proposed rule revision unaccountably omits the factual predicate set forth in the policy statement, i.e., that the firm has obtained such relevant information regarding product experience or performance in a foreign country. This omission raises the specter that the revised interpretative rule could later be read as imposing an obligation to establish the sort of "due diligence" systems to monitor and acquire foreign product-related information that CPSC now views as necessary for product experience and performance in the United States. Particularly in the case of a company which is the U.S. subsidiary of a multi-national corporate parent that has separate subsidiaries in other countries around the world, such an interpretation would be both unreasonable and unrealistic.

II. The Proposed Revision of the Reporting Rule is Based on the Unfounded Assumption that Foreign Product Information is Readily and Generally Available to U.S. Companies

In the preamble to the final policy statement, CPSC asserts that "business globalization and improvements in communication" have substantially reduced the impediments to obtaining product information from abroad. 66 Fed. Reg. at 30716. The Commission asserts further that firms frequently communicate via computer, telephone and fax machine with overseas customers, suppliers and "corporate relatives," and that there is thus no justification for the premise that obtaining foreign product information is more difficult than obtaining the same types of domestically generated information.

In fact, it is CPSC's assumption that foreign and domestic product information are equally accessible that has no justification or support. In the domestic context, both the suppliers and wholesale customers (such as dealers or retailers) of a product manufacturer or distributor have direct business relationships with the company and are themselves subject to CPSC jurisdiction. In contrast, manufacturers and distributors that are U.S. subsidiaries of multi-national parent companies with separate subsidiaries that distribute products in other countries have no direct business relationship with those separate distributor subsidiaries, although they may fall into the category of "corporate relatives" as used by CPSC. In addition, neither the parent company nor the separate subsidiaries in

other countries are themselves subject to CPSC jurisdiction. See 15 U.S.C. §2052(a)(10) and (14). This presents a very different situation with respect to the availability to the U.S. subsidiary of information regarding product experience or performance in foreign countries. CPSC has presented no factual support for its glib assertion that the advent of computers and fax machines has made readily and generally available to U.S. subsidiaries information regarding products distributed in foreign countries by separate subsidiary corporations with which they have no direct business relationship.

Indeed, one commenter on the policy statement raised this issue directly by contending that the statement potentially places a new and undue burden on U.S. companies to implement monitoring programs abroad comparable to those in the United States. 66 Fed. Reg. at 30715-16. CPSC in its preamble discussion only indirectly addressed this comment by first asserting that the policy statement imposes no burdens on firms that did not previously exist. It then cited one example involving a penalty that was imposed to settle allegations that a company failed to report foreign information relating to a defective water distiller in a timely manner. Id. at 30716. However, the Commission made clear that the firm "had learned about" the foreign information at issue substantially before it finally reported to the Commission. In other words, the example concerned a situation in which, as in the policy statement itself, the firm "obtains information" from a foreign country which is relevant to a U.S. product and allegedly meets the criteria for reporting.

The separate and additional issue of whether CPSC viewed the company as having an obligation to seek out and monitor such foreign information on a routine basis was simply not addressed. The Commission's blithe assertion that such information is as readily available as domestically generated customer complaints or warranty claims continues to raise the concern that under the proposed revision, it might interpret the CPSA as imposing such an unreasonable and open-ended obligation. While domestically generated information could perhaps be expected to reach U.S. companies from suppliers and retailers under established patterns of U.S. business relationships, a similar assumption simply cannot be made with respect to U.S. subsidiaries and information regarding the same or similar products distributed internationally by separate subsidiary companies.

III. The Proposed Revision Should be Reconsidered and Modified

As currently proposed, the CPSC's suggested revision to the interpretative rule regarding substantial product hazard reporting under Section 15(b) is susceptible to unreasonably broad interpretations and does not even accurately reflect the substance of CPSC's recently adopted policy statement. The proposed revision should be reconsidered and modified to rectify these problems. Moreover, because it concerns an interpretative rather than a substantive rule, the revision would not resolve the underlying jurisdictional question of whether CPSC has authority to require product reporting based on events or actions outside the United States. See 15 U.S.C. §2052(a)(10) and (14).

A key deficiency is the omission of the underlying factual predicate of the policy statement, i.e., the situation where a U.S. company obtains information regarding incidents or experience with a product sold in a foreign country that is relevant to the same or a substantially similar product sold or distributed in the U.S. At a minimum, the proposed revision to the reporting rule should be modified to make clear that it deals with instances where a firm actually "obtains" foreign information that is in fact relevant to a product sold or distributed in the United States. Any such revision to the rule should correspondingly make clear that a firm "obtains" such foreign information only when an employee of the firm capable of appreciating its significance actually receives it.

As previously noted, reconsideration and modification is necessary to avoid potentially unreasonable interpretations of the revised rule and to comport with the stated purpose that the revision should reflect the substance of CPSC's recently adopted policy statement.

IV. Conclusion

It is very important that the Commission reconsider and modify its proposed revision in the substantial hazard reporting rule in order to avoid unfounded assumptions and potentially unreasonable and burdensome interpretations. Without modification, the proposed revision will unfortunately have the counterproductive effect of creating uncertainty and confusion with respect to the reporting and compliance obligations of U.S. companies under Section 15(b) of the CPSA. Such an outcome is not in the interest of the Commission, the many thousands of affected firms that it regulates, or the public.

Sincerely,

Michael A. Wiegard

B&F
BROWN & FREEDSON P.C.

July 6, 2001

Todd Stevenson
Acting Secretary,
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

Proposed Amendment to CPSC's
Substantial Product Hazard Reports
Title 16 C.F.R. Part 1115

Dear Mr. Stevenson:

The purpose of this letter is to provide comments on the Consumer Product Safety Commission's ("CPSC") proposed amendment to Title 16 C.F.R. Part 1115 published in the *Federal Register* of June 7, 2001 at pages 30655 – 30656[1].

This firm represents several clients who believe that the CPSC's proposal is overly broad and vague. Without agreeing that the CPSC has the authority to require any reporting of incidents or activities that occur outside the defined jurisdiction of the CPSC[2], the concern of our clients is that, despite the initial comments made when CPSC first announced its intention to publish a policy statement, the CPSC continues to blur its policy statement about duties of entities within the United States. Assuming *arguendo* that a company subject to the jurisdiction of the CPSC will evaluate information from any source, foreign or domestic, in determining its reporting duties under Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. § 2064(b), the CPSC's attempts to provide guidance are still imprecise.

There are, at a minimum, two types of entities operating within the United States that are affected by the CPSC's latest proposal. First, some companies are headquartered in the United States. According to CPSC's proposal, these companies must obtain information from some corporate relation outside the United States before they can decide whether a foreign incident or claim provides a reason to report to CPSC under the provisions of Section 15(b). As the "parent" company of overseas entities, the U.S. headquartered company is in a position to require reporting of information about foreign incidents.

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[1] Revised Section 1115.12(f).

[2] *See, e.g.*, Sections 3(a)(10) and (14) of the Consumer Product Safety Act, 15 U.S.C. §§ 2052(a)(10) and (14).

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Other entities operating in the United States, however, are themselves subsidiaries of companies based outside the United States. As such, these companies are not in any position to dictate reporting of product information from the parent company or related companies doing business outside the United States. This is particularly true when the product involved is designed and/or manufactured outside the United States. In the normal course of business, information about common products may be exchanged between the parent and its subsidiaries, but the United States-based company does not dictate the timing or substance of this process. Also, the concept of a defective product varies among different countries. For example, in other countries a problem experienced with a product because consumers do not follow care instructions or use directions is not considered a defect. Therefore, this information is unlikely to be considered noteworthy or worth circulating to global counterparts.

Therefore, United States-based subsidiaries have two concerns with CPSC's proposal – (1) the CPSC proposal does not acknowledge that the United States-based company cannot control the timing and content of information from parent or related companies and (2) if information eventually makes its way to a United States-based company and a report is made to the CPSC under Section 15(b), will CPSC focus on the time product information was available to another entity outside the United States? If the timeliness of reporting of United States-based entities is judged by the time information first became available outside the United States, this would be unfair and it would create an incentive for United States-based companies to do everything they could to avoid ever learning about foreign product experience. Clearly this would be against the spirit and intent of the CPSC's latest policy pronouncement.

Despite the CPSC's somewhat unrealistic allusion to the abilities of a worldwide computer based society[3], global systems for communicating among various branches of companies are expensive and cumbersome to maintain. The differences in language, custom and ways of doing business mean that such systems are established and maintained only when based on demonstrated need. The CPSC's comments in the Supplementary Information portions of the notices in the June 7 *Federal Register*[4] appear to assume the existence of global state-of-the-art communications devoted to product incidents. This is not the case in the real world. If, however, this is what CPSC believes is required by Section 15(b), it should clearly state this in its amendment. Even if a policy statement

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[3] CPSC, Issuance of Policy Statement, 66 *F.R.* 30715, June 7, 2001, at 30716.

[4] CPSC, Issuance of Policy Statement, 66 F.R. 30715 and CPSC, Substantial Product Hazard Reports, 66 F.R. 30655.

cannot be challenged through normal administrative rulemaking review, CPSC's intent should be clear enough to allow public comment and legislative review.

We respectfully request that CPSC directly and precisely respond to these concerns. The broad, vague language now used in the proposed amendment and the evasive analysis in the Supplementary Information accompanying CPSC's latest policy statements do more to raise concerns than address them.

Sincerely yours,

Michael A. Brown